UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LOYOLA UNIVERSITY CHICAGO
Employer

and Case 13-RC-189548

SERVICE EMPLOYEES INTERNATIONAL
UNION LOCAL 73, CLC/CTW
Petitioner

ORDER

The Employer's Request for Review of the Regional Director's Decision and Direction of Election is denied as it raises no substantial issues warranting review.[1]

MARK GASTON PEARCE, MEMBER

LAUREN McFERRAN, MEMBER

Dated, Washington, D.C., July 6, 2017.

Chairman Miscimarra, dissenting:

[1] We affirm the Regional Director's finding that he was bound by *Trustees of Columbia University in the City of New York,* 364 NLRB No. 90 (2016), and his conclusion that the graduate students at issue are employees within the meaning of Sec. 2(3) of the Act under that authority. In affirming that conclusion, we reject the Employer's contention that Loyola's graduate assistants are distinguishable from those found to be employees in *Columbia University.* Even assuming that the Employer timely raised that argument in its December 16, 2016 Statement of Position and December 19, 2016 Supplemental Letter submitted to the Regional Director, and further assuming that the Regional Director should have accepted the Employer's offer of proof to that effect at the December 19, 2016 hearing, we find that the evidence described in the offer of proof (as set forth at pages 18-25 and 40-41 of the Employer's request for review) is insufficient to sustain the Employer's position. See Sec.102.66(c) of the Board's Rules and Regulations. Unlike our dissenting colleague, we find that the Employer's offer of proof provides an adequate and appropriate basis for evaluating the sufficiency of the evidence the Employer sought to adduce in support of its claim that the student assistants at issue are distinguishable from those in *Columbia University*. See 79 Fed. Reg. 74307, 74426 (Dec. 15, 2014). Here, the offer of proof fails to demonstrate with any specificity how or why the evidence regarding the Loyola graduate assistants is distinguishable from the evidence regarding the graduate assistants in *Columbia University.* Indeed, the offer of proof fails to cite a single distinguishing fact from *Columbia University.*

Once again, the Board is asked to address the question of whether Loyola University of Chicago is subject to the Board's jurisdiction, and once again I disagree with my colleagues. Although the prior *Loyola* cases[1] involved the Board's jurisdiction over the University's faculty members, and the instant case involves the Board's jurisdiction over the University's graduate assistants, in my view, the answer is the same: Loyola University of Chicago is exempt from the Act's coverage.

As I explained in my separate opinion in *Pacific Lutheran University*, 361 NLRB No. 157, slip op. at 26–27 (2014) (Member Miscimarra, concurring in part and dissenting in part), when determining whether a religious school or university is exempt from the Act's coverage based on First Amendment considerations, I believe the Board should apply the three-part test articulated by the Court of Appeals for the District of Columbia Circuit in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002). Under that test, the Board has no jurisdiction over faculty members at a school that (1) holds itself out to students, faculty and community as providing a religious educational environment; (2) is organized as a nonprofit; and (3) is affiliated with or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion. Id. at 1343. As explained in my dissenting opinions in the prior *Loyola* cases, the University has raised a substantial issue regarding whether it is exempt from the Act's coverage under that three-part test. It is undisputed that the University holds itself out to the public as providing a religious educational environment. It is also undisputed that it is organized as a nonprofit and is affiliated with the Catholic Church and the Society of Jesus. Accordingly, I would grant the University's request for review because substantial questions exist regarding whether the Board lacks jurisdiction over the University as a religiously affiliated educational institution and whether the *Pacific Lutheran* standard is unconstitutional under the First Amendment.

Further, even if the two-prong *Pacific Lutheran* standard is applied, I would grant review because I believe there is a substantial issue regarding whether Loyola University is an exempt religiously affiliated educational institution on the basis that (1) it holds itself out as providing a religious educational environment, and (2) individuals in the petitioned-for unit play a specific role in creating or maintaining the University's religious educational environment. As to this last question, I believe substantial questions exist with respect to the specific role played by the graduate assistants – who are mentored by faculty members – in providing students exposure to diverse viewpoints, which is an important aspect of a Jesuit education. See *Great Falls*, supra, 278 F.3d at 1346 ("That a secular university might share some goals and practices with a Catholic or other religious institution cannot render the actions of the latter any less religious."); *Pacific Lutheran University*, supra, slip op. at 31 (Member Johnson, dissenting) ("The majority also errs fundamentally here by assuming a false dichotomy between 'religious' and 'secular' instruction."). In my view, the Board should therefore grant review to consider the merits of the jurisdictional and constitutional issues presented.

---

[1] See *Loyola University Chicago*, 13-CA-168082 (July 20, 2016) (Member Miscimarra, dissenting), and *Loyola University Chicago*, 13-RC-164618 (March 16, 2017) (Acting Chairman Miscimarra, dissenting).

Contrary to my colleagues, I would also find that the University has raised substantial issues warranting review of the Regional Director's decision to preclude the University from presenting an offer of proof, or any evidence, regarding whether the petitioned-for graduate assistants are employees within the meaning of the Act. The University argued in its statement of position that *Trustees of Columbia University in the City of New York*, 364 NLRB No. 90 (2016), was wrongly decided. It also argued at the hearing that its graduate assistants are distinguishable from those in *Columbia University*. The Regional Director ruled that because he was bound by the Board's *Columbia University* decision, the parties were precluded from presenting evidence as to whether the graduate assistants are statutory employees. He further ruled that because the University failed to argue in its statement of position that its graduate assistants are distinguishable from those in *Columbia University* but instead raised the issue for the first time at the hearing, the argument would not be considered. I believe both of these rulings were erroneous.

First, the petitioned-for unit is inappropriate to the extent that it includes persons who are not statutory employees. As I explained in *IGT Global Solutions*, 01-RC-176909 (Dec. 21, 2016) (Member Miscimarra, concurring in part and dissenting in part), Section 9(b) of the Act requires the Board "in each case" to determine whether the petitioned-for unit is appropriate. To do so, the Board's Regional Directors have been expressly provided with discretion to elicit the evidence necessary for making such determinations regardless of whether the issue is mentioned in a party's statement of position. See Section 102.66(b) of the Board's Rules and Regulations, as amended (provision stating that"[t]he hearing officer shall not receive evidence concerning any issue as to which parties have not taken adverse positions" does not limit "the receipt of evidence regarding the Board's *jurisdiction* over the employer or limit the regional director's discretion to direct the receipt of evidence concerning any issue, such as the *appropriateness of the proposed unit*, as to which the regional director determines that the receipt of evidence is necessary") (emphasis added).[2] See also *Brunswick Bowling Products, LLC*, 364 NLRB No. 96 (2016) (upholding the Regional Director's finding that a decertification petition was barred by an existing collective-bargaining agreement, resulting in the petition's dismissal, even though the contract bar issue was not raised in a timely served statement of position).

Indeed, in both *Duke University*, 10-RC-197957 (Jan. 3, 2016), and *Yale University*, 01-RC-183014 et al. (Feb. 22, 2017), the employers were permitted to make offers of proof and to litigate the issue of whether the petitioned-for student assistants were statutory employees, including whether the student assistants were sufficiently distinct from those in *Columbia University*, even though the argument had not been raised in either employer's statement of position. The Acting Regional Director in *Duke* and the Regional Director in *Yale* clearly understood the breadth of their discretion under the Board's Rules and Regulations, as well as the importance of eliciting the evidence necessary to determine whether the disputed student

[2] See also 79 Fed. Reg. 74307, 74399, 74484 (Dec. 15, 2014) (stating that non-compliance with the statement of position requirement does not "limit the regional director's discretion to direct the receipt of evidence concerning any issue, such as the appropriateness of the proposed unit, as to which the regional director determines that record evidence is necessary").

assistants were statutory employees. In my view, the Regional Director in this case should have permitted the University to litigate the issue of employee status as in *Duke* and *Yale*.[3]

Second, and more generally, as I explained in my dissenting opinion in *Columbia University*, I do not believe that student assistants, such as the graduate assistants here, are employees within the meaning of the Act.

For these reasons, I would grant review of the Regional Director's decision that the Board has jurisdiction over the petitioned-for unit at issue in this case, as well as whether the graduate assistants in the petitioned-for unit are statutory employees. I therefore respectfully dissent.

PHILIP A. MISCIMARRA, CHAIRMAN

[3] Contrary to my colleagues, in my view it is inappropriate for the Board to treat an offer of proof as a substitute for record evidence regarding any matter that is relevant in any representation case. See 79 Fed. Reg. at 74446-74447. Consequently, I would not rely on the evidence described in the University's offer of proof to resolve whether the graduate assistants at issue here can be distinguished from those in *Columbia University*, thereby warranting a different result.